

## Foreign Service Grievance Board

Pt. 904

immaterial, or unduly repetitive. Parties shall follow procedures established by the Board concerning the use of interrogatories.

### § 903.7 Acknowledgment.

Each case received shall be acknowledged in writing by the executive secretary of the Board. If in the judgment of the executive secretary additional documentation or information is needed, he or she may request such materials.

### § 903.8 Withdrawal.

A case may be withdrawn at any time by written notification to the Board from the party initiating the case. A case may be determined by the Board to have lapsed when the grievant fails to respond in writing to two successive written Board inquiries within any deadline fixed for such response. The Board may permit the reopening of lapsed cases upon a showing of good cause and may permit or request the views of the parties as to whether good cause has been shown.

### § 903.9 Access to records.

(a) If a party is denied access to any Agency record prior to or during the consideration of a case by the Agency, the party may protest such denial before the Board in connection with the case.

(b) In considering a case, the Board shall have access to any Agency record as follows:

(1) the Board shall request access to any Agency record which the grievant/charged employee requests to substantiate his or her grievance or defense to a charge if the Board determines that such record may be relevant and material to the case.

(2) the Board may request access to any other Agency record which the Board determines may be relevant and material to the case.

(3) An Agency shall make available to the Board any Agency record requested under paragraphs (b)(1) and (2) of this section unless the head or deputy head or such Agency personally certifies in writing to the Board that disclosure of the record to the Board and the parties would adversely affect the foreign policy or national security

of the United States or that such disclosure is prohibited by law. If such a certification is made with respect to any record, the Agency shall supply to the Board a summary or extract of such record unless the reasons specified in the preceding sentence preclude such a summary or extract.

(c) If the Board determines that an Agency record, or a summary or extract of a record, made available to the Board under paragraph (b) of this section is relevant and material to the case, the Agency concerned shall make such record, summary, or extract, as the case may be, available to the parties.

(d) In considering a case, the Board may take into account the fact that the parties or the Board were denied access to any Agency record which the Board determines is or may be relevant and material to the case.

(e) The parties in any case decided by the Board shall have access to the record of proceedings and the decision of the Board.

### § 903.10 Access to witnesses.

The grievant or grievant's representative, or charged employee or his representative, shall be given access to witnesses employed by the foreign affairs agencies. In the event that the agency of the grievant determines that the requests for access are excessive, it may so notify the Board, which shall rule on the relevance and materiality of the potential testimony and may order that access be granted to any or all of the potential witnesses. It shall be the responsibility of the grievant to advise the agency of the agency witnesses to be interviewed and to request administrative leave.

## PART 904—JURISDICTION AND PRELIMINARY DETERMINATIONS

Sec.

904.1 General.

904.2 Preliminary determinations.

904.3 Relationship to other remedies.

904.4 Suspension of agency actions.

AUTHORITY: Secs. 1101, 1104, 1108, and 1109 of the Foreign Service Act of 1980, Pub. L. 96-465 (22 U.S.C. 4131, 4134, 4138, and 4139), as amended.

## **§ 904.1**

## **22 CFR Ch. IX (4-1-14 Edition)**

### **§ 904.1 General.**

The Board's jurisdiction extends to any grievance, and to any separation for cause proceeding initiated pursuant to section 610(a)(2) of the Act.

[50 FR 31355, Aug. 2, 1985]

### **§ 904.2 Preliminary determinations.**

(a) If an Agency, in its final review, has questioned whether a complaint constitutes a grievance, the Board will make a preliminary determination of its jurisdiction unless the Board concludes that resolution of the question of jurisdiction should be deferred until the Board has compiled a record of proceedings or held a hearing on the merits of the case.

(b) The Board may also make a preliminary determination on any question raised by a Party concerning the timeliness of a grievance, the election of other remedies under § 904.3, or any other issue whose resolution might avoid the necessity of further proceedings.

(c) Before making a preliminary determination under this section, the Board shall obtain the views of the other parties and transmit those views to all parties.

(d) Where an issue presented for preliminary determination under this section is contested by a party or would result in the termination of a case, a panel of three members of the Board shall decide the issue.

[50 FR 31355, Aug. 2, 1985, as amended at 56 FR 55459, Oct. 28, 1991]

### **§ 904.3 Relationship to other remedies.**

(a) A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief provided under another provision of law, regulation, or executive order, and the matter has been carried to final decision under such provision on its merits or is still under consideration. This provision shall not apply to grievants who have filed a prohibited personnel practice charge before the Special Counsel for the Merit Systems Protection Board.

(b) If a grievant is not prohibited from filing a grievance under paragraph (a) of this section, the grievant may file with the Board a grievance which is also eligible for consideration, resolution, and relief as a prohibited personnel practice complaint under the provisions of law relating to the Merit Systems Protection Board or Special Counsel, or under a regulation or executive order. An election of remedies under this section shall be final upon the acceptance of jurisdiction by the Board.

[50 FR 31355, Aug. 2, 1985]

### **§ 904.4 Suspension of agency actions.**

(a) If the Board determines that the agency is considering involuntary separation of the Grievant, disciplinary action against the Grievant, or recovery from the Grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board, and that such action should be suspended, the agency shall suspend such action until the Board has ruled on the grievance. Notwithstanding such suspension of action, the head of the agency concerned or a chief of mission or principal officer may exclude the Grievant from official premises or from the performance of specified functions when such exclusion is determined in writing to be essential to the functioning of the post or office to which the Grievant is assigned.

(b) Notwithstanding paragraph (a) of this section, the Board shall not determine that action to suspend without pay a Grievant shall be suspended if the head of an agency or his designee has determined that there is reasonable cause to believe that a Grievant has committed a job-related crime for which a sentence of imprisonment may be imposed and has taken action to suspend the Grievant without pay pending a final resolution of the underlying matter. For this purpose, reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed shall be defined as a member of the Service having been convicted of, and sentence of imprisonment having been imposed for a job-related crime.

## Foreign Service Grievance Board

## § 906.1

(c) The Board shall expedite its decisions on requested suspensions of proposed Agency actions. The Board may permit or require argument with respect to such requests by the Parties and Exclusive Representative, if any.

[56 FR 55459, Oct. 28, 1991]

### PART 905—BURDEN OF PROOF

Sec.

905.1 Grievances other than disciplinary actions.

905.2 Disciplinary grievances.

905.3 Separation for cause.

AUTHORITY: Secs. 610 and 1106 of the Foreign Service Act of 1980, Pub. L. 96-465 (22 U.S.C. 4010 and 4136), as amended.

#### § 905.1 Grievances other than disciplinary actions.

(a) In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious.

(b) Where a grievant establishes that an evaluation contained falsely prejudicial material which may have been a substantial factor in an agency action, and the question is presented whether the agency would have taken the same action had the evaluation not contained that material, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

(c) Where a grievant establishes that a procedural error occurred which is of such a nature that it may have been a substantial factor in an agency action with respect to the grievant, and the question is presented whether the agency would have taken the same action had the procedural error not occurred, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

[50 FR 31356, Aug. 2, 1985]

#### § 905.2 Disciplinary grievances.

In grievances over disciplinary actions, the agency has the burden of establishing by a preponderance of the evidence that the disciplinary action was justified, provided, however, that

in a grievance concerning suspension without pay pursuant to section 610(a)(3) of the Act, the Board's determination of the grievance shall be limited to:

(a) Whether the required procedures have been followed; and

(b) Whether there exists reasonable cause to believe a crime has been committed for which a sentence of imprisonment may be imposed and there is a nexus between the conduct and the efficiency of the Service.

For this purpose, reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed shall be defined as a member of the Service having been convicted of, and sentence of imprisonment having been imposed for, a job-related crime.

[56 FR 55459, Oct. 28, 1991]

#### § 905.3 Separation for cause.

In separation for cause cases, the agency has the burden of establishing, by a preponderance of the evidence, that the proposed separation is for such cause as will promote the efficiency of the service.

[50 FR 31356, Aug. 2, 1985]

### PART 906—HEARINGS

Sec.

906.1 Decision whether to hold a hearing.

906.2 Mandatory hearing.

906.3 Notification.

906.4 Hearing panels and members.

906.5 Prehearing conferences.

906.6 Powers of presiding member.

906.7 Conduct of hearing.

906.8 Witnesses.

906.9 Failure of party to appear.

AUTHORITY: Secs. 610 and 1106 of the Foreign Service Act of 1980, Pub. L. 96-465 (22 U.S.C. 4010 and 4136), as amended.

SOURCE: 50 FR 31356, Aug. 2, 1985, unless otherwise noted.

#### § 906.1 Decision whether to hold a hearing.

After deciding either to accept jurisdiction over a grievance or to postpone decision of that question under § 904.2(a) of this chapter, the Board will make an initial determination of whether a hearing shall be held in accordance with part 906 of this chapter,